87-274

No. 87-

Supreme Court, U.S.
FILED
JUL 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FRANK D. BUNTON, CERF HIRSCH,
JAN HIRSCH VAN HORN, JOE CORDILL,
MRS. JOHN MEREDITH AND EDMUND B. LEWIS, JR.,

Petitioners,

VS.

NABISCO BRANDS, INC.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

VIAL, HAMILTON, KOCH & KNOX
BRUCE W. BOWMAN, JR.
(Counsel of Record)
ROMAN J. KUPCHYNSKY, II
1500 First RepublicBank Center
Tower II
Dallas, Texas 75201
(214) 922-9393

Attorneys For Petitioners

---

36 pp

QUESTIONS PRESENTED

WHETHER NABISCO'S SELF TENDER OFFER FOR THE $3.50 CUMULATIVE PREFERRED STOCK VIOLATED NABISCO'S CERTIFICATE OF INCORPORATION AND THE SECURITIES EXCHANGE ACT OF 1934 AND THE SECURITIES ACT OF 1933.

WHETHER THE DISTRICT COURT AND THE FIFTH CIRCUIT COURT OF APPEALS MISAPPLIED THE TWO YEAR STATUTE OF LIMITATIONS TO PETITIONERS' CAUSES OF ACTION FOR BREACH OF FIDUCIARY DUTY AND VIOLATIONS OF SECTIONS 10, 13(e) AND 14(e) OF THE SECURITIES EXCHANGE ACT OF 1934 AND THE RULES PROMULGATED THEREUNDER.

WHETHER THE DISTRICT COURT ERRED WHEN IT GRANTED, AND THE FIFTH CIRCUIT ERRED WHEN IT AFFIRMED THE DISTRICT COURT'S, DIRECTED VERDICT ON PETITIONERS' RACKETEER INFLUENCE AND CORRUPT ORGANIZATIONS ACT ("RICO") CAUSE OF ACTION.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF ABBREVIATIONS	iv
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING WRIT	5
I. NABISCO'S SELF TENDER OFFER FOR THE PETITIONERS' $3.50 CUMULATIVE PREFERRED STOCK VIOLATED THE RIGHTS OF THE $3.50 CUMULATIVE PREFERRED SHAREHOLDERS UNDER NABISCO'S CERTIFICATE OF INCORPORATION AND THE SECURITIES EXCHANGE ACT OF 1934 AND THE SECURITIES ACT OF 1933	5
II. THE DISTRICT COURT AND THE FIFTH CIRCUIT COURT OF APPEALS MISAPPLIED THE TWO YEAR STATUTE OF LIMITATIONS TO PETITIONERS' CAUSES OF ACTION FOR BREACH OF FIDUCIARY AND VIOLATIONS OF SECTIONS 10, 13(e) AND 14(e) OF THE SECURITIES EXCHANGE ACT OF 1934 AND THE RULES PROMULGATED THEREUNDER	12
A. THE APPLICABLE STATUTE OF LIMITATIONS BEGINS TO ACCRUE WHEN A LEGAL INJURY RESULTS	16

III. THE DISTRICT COURT ERRED WHEN IT GRANTED AND THE FIFTH CIRCUIT ERRED WHEN IT AFFIRMED THE DISTRICT COURT'S, DIRECTED VERDICT ON PETITIONERS' RACKETEER INFLUENCE AND CORRUPT ORGANIZATIONS ACT ("RICO") CAUSE OF ACTION 18

CONCLUSION 20

APPENDIX

TABLE OF ABBREVIATIONS

For the convenience of the Court, the following abbreviations will be used in Petitioners' Petition for Writ of Certiorari:

Transcript of Proceedings in District Court for the Eastern District of Texas	TR.
Record/Pleadings in District Court for the Eastern District of Texas	R.

TABLE OF AUTHORITIES

Cases

	PAGE
Atkins v. *Crossland*, 417 S.W.2d 150 (Tex. 1967)	16,18
Atomic Fuel Extraction Corp. v. *Slick's Estate*, 386 S.W.2d 180 (Tex. Civ. App. — San Antonio 1964, writ ref'd n.r.e.)	14
Bauman v. *Centex Corp.* 611 F.2d 1115, 1116 (5th Cir. 1980)	13,15,16
Boeing Company v. *Shipman*, 411 F.2d 365, 374 (5th Cir. 1969)	18
Certain Feed Produce Corp. v. *Bell*, 411 S.W.2d 695 (Tex. Civ. App. — Amarillo 1967) aff'd 422 S.W.2d 719 (Tex. 1968)	16
Coastal Distributing v. *NGK Spark Plug Co.*, 779 F.2d 1033, 1038 (5th Cir. 1986)	13,14,15
Erie Railroad Company v. *Tompkins*, 304 U.S. 64 (1938)	12
Gearhart Industries, Inc. v. *Smith Intern., Inc.*, 741 F.2d 707 (5th Cir. 1984)	12
Graham v. *Turner*, 472 S.W.2d 831, 836 (Tex. Civ. App. — Waco 1971, no writ)	13
Hays v. *McNeice*, 641 S.W.2d 695 (Tex. App. — Amarillo 1982, no writ)	15
Hughes v. *Houston Northwest Medical Center*, 680 S.W.2d 838 (Tex. App. — Houston [1st Dist.] 1984, writ ref'd n.r.e.) *cert. denied*, 106 S. Ct. 571 (1984)	12
Lehman v. *Lycoming County Children's Services*, 458 U.S. 502, 507 (1982)	5
McNeal v. *Paine Webber, Jackson & Curtis, Inc.*, 598 F.2d 888 (5th Cir. 1979)	12
Miller v. *Kountze Corporate School Dist.*, 54 S.W.2d 344 (Tex. Comm'n App. 1932, opinion adopted)	16
Mooney v. *Harlin*, 622 S.W.2d 83, 84 (Tex. 1981)	15
Neely v. *Bankers Trust Co.*, 757 F.2d 621, 632 (5th Cir. 1985)	15

PAGE

Peek v. *Berry*, 143 Tex. 294, 184 S.W.2d 272, 275 (1944) 12

Quinn and Ryan v. *Collins*, 496 S.W.2d 205, 210 (Tex. Civ. App. — Tyler 1973, writ ref'd n.r.e.) .. 14

Quinn v. *Press*, 135 Tex. 60, 140 S.W.2d 438 (1940)

Rice v. *Sioux City Memorial Park Cemetary*, 349 U.S. 70 (1955) 5

Spellings v. *Lawyers Title Ins. Corp.*, 644 S.W.2d 804 (Tex. App. — Corpus Christi 1982, writ ref'd n.r.e.) 15

Sterling v. *H. F. Watson, Co.*, 297 A. 290 (Pa. 1913) 11

Travelers Ins. Co. v. *Delta Airlines, Inc.*, 498 S.W.2d 443, 447 (Tex. Civ. App. 1973) 16

U.S. v. *Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980) cert. denied, 450 U.S. 912 (1981) 19

U.S. v. *Elliott*, 571 F.2d 880, 898 (5th Cir. 1978) .. 19

U.S. v. *Hartley*, 678 F.2d 961, 968 (11th Cir. 1982) 19

U.S. v. *Turkette*, 452 U.S. 516, 587 (1981) 19

Williams v. *Lee*, 358 U.S. 217 (1959) 5

Yeaman v. *Galveston City Co.*, 167 S.W. 710 (Tex. 1914) 13

STATUTES

15 U.S.C. Section 78j, 78m(e), 78n(e) (1963) ..... *passim*

18 U.S.C. Sections 1961-1964 (1972) 18,19

TEX. BUS. COMM. CODE Section 27.01 (Vernon's 1985) 13

TEX. CIV. PRAC. & REM CODE Sections 16.001, 16.004 and 16.051 (Vernon's 1986) 2,12,13,14,16

TEX. REV. CIV. STAT. ANN. ART. 5526 (Vernon's Supp. 1979) 2,13,15

TEX. REV. CIV. STAT. ANN. ART. 5527(1) (Vernon's Supp. 1979) 2,14

TEX. REV. CIV. STAT. ANN. ART. 5529 (Vernon's Supp. 1979) 2,12

PAGE

MISCELLANEOUS

Webster's New College Dictionary, 1979, page 960 .. 10
Fletcher Cyc. Corp. Section 2854 (Perm. Ed.) 11

No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FRANK D. BUNTON, CERF HIRSCH,
JAN HIRSCH VAN HORN, JOE CORDILL,
MRS. JOHN MEREDITH AND EDMUND B. LEWIS, JR.,

Petitioners[1]

VS.

NABISCO BRANDS, INC.

Respondent[2]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FRANK D. BUNTON, CERF HIRSCH, JAN HIRSCH VAN HORN, JOE CORDILL, MRS. JOHN MEREDITH and EDMUND B. LEWIS, JR., respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above entitled case.

OPINIONS BELOW

The Opinions of the Court of Appeals for the Fifth Circuit and the United States District Court for the Eastern District of Texas, Tyler Division, have not been reported. The opinions are reprinted in the Appendix attached hereto.

---

[1] Petitioners are: Frank D. Bunton, Cerf Hirsch, Jan Hirsch Van Horn, Joe Cordill, Mrs. John Meredith and Edmund B. Lewis, Jr.

[2] Respondent is: Nabisco Brands, Inc., a Delaware corporation that is a wholly owned subsidiary of R. J. Reynolds, Inc.

JURISDICTION

The petitioners brought this suit in the Eastern District of Texas, Tyler Division claiming *inter alia* violations of the Securities Exchange Act of 1934, 15 U.S.C. Sections 78m(e), 78(n)(e) and Section 78j and Rule 10b-5, Rule 14(d) and 14(e) and Rule 13(_) and 13(e)-3 and Section 22 of the Securities Act of 1933. On June 5, 1986, the District Court entered judgment for Respondent. *See* Appendix.

On Petitioners' appeal to the United States Court of Appeals for the Fifth Circuit, the Fifth Circuit, on April 13, 1987, affirmed without opinion the District Court's judgment. *See* Appendix. No petition for rehearing was sought.

The jurisdiction of this Court is invoked under 28 U.S.C. Sections 1254(1), 1257(3), and 2101.

STATUTES INVOLVED

15 U.S.C. Section 78j, 78m(e) and 78n(e) (1963); 18 U.S.C. Sections 1961-1964 (1972); TEX. BUS. COMM. CODE Section 27.01 (Vernon's 1985); TEX. CIV. PRAC. & REM. CODE Sections 16.004 and 16.051 (Vernon 1986); TEX. REV. CIV. STAT. ANN. Art. 5526 (Vernon's Supp. 1979); TEX. REV. CIV. STAT. ANN. Art. 5527(1) (Vernon's Supp. 1979); and TEX. REV. CIV. STAT. ANN. Art. 5529 (Vernon's Supp. 1979).

STATEMENT OF THE CASE

Petitioners were preferred shareholders of Nabisco Brands, Inc. ("Nabisco"). On August 15, 1985, they instituted an action against Nabisco alleging that Nabisco by and through its directors and officers used a self tender offer in a manipulative, fraudulent and deceptive manner in order to redeem and cancel the Nabisco $3.50 Cumulative Preferred Stock. As a result, Nabisco breached its fiduciary duty to Petitioners and breached its contract, as set forth in its Certificate of Incorporation, as amended, with Petitioners (R. 9) by utilizing a self tender offer of $50.00 per share instead of paying the redemption price of

$100.00 per share in order to retire the $3.50 Cumulative Preferred Stock. (TR. 106). The purpose and effect of Nabisco's self tender offer was a defacto redemption of the $3.50 Cumulative Preferred Stock.

In order to assist the Court in understanding this Petition for Writ of Certiorari, a short review of the history of the $3.50 Cumulative Preferred of Nabisco Brands, Inc. is important. In 1929, Standard Brands, Inc. ("Standard Brands") was incorporated under the laws of the State of Delaware and had outstanding a small issue of $7.00 Cumulative Preferred Stock listed on the New York Stock Exchange. (TR. 6). The preferred stock was redeemable in whole or in part on thirty days notice at $120.00 per share. Due to the financial conditions of the time, on or about June 1, 1937, management of Standard Brands redeemed and cancelled all outstanding shares of the $7.00 Cumulative Preferred at $120.00 per share. (TR. 67). Management authorized a new issue of $4.50 Cumulative Preferred Stock redeemable at $110.00 and listed such stock on the New York Stock Exchange. In 1946, Standard Brands redeemed all the outstanding shares of the $4.50 Cumulative Preferred at the stated redemption price of $110.00 a share and replaced it with the current $3.50 Cumulative Preferred which is the basis of this suit. (TR. 8). The $3.50 Cumulative Preferred Stock was redeemable at $100.00 per share.

On July 1, 1981, the shareholders of Standard Brands met in New York City to vote on a proposed merger with Nabisco, (TR. 9). One condition for the approval of the combination with Nabisco was that the new Nabisco $3.50 Cumulative Preferred Stock would have the same preference, special rights and powers as the Standard Brands $3.50 Cumulative Preferred Stock. Based on the representation by Nabisco that these conditions would be met prior to the combination of Standard Brands and Nabisco, the combination was approved by the shareholders and became effective on July 6, 1981, with both the common and preferred stock of Nabisco being listed on the New York Stock Exchange on that date. (TR. 114-115). Purchasers of the new

Nabisco $3.50 Cumulative Preferred Stock knew the history of the prior preferred stock redemptions and the logical corollary that Nabisco would probably redeem the preferred stock in the future. (TR. 68). On or about May 20, 1983, rather than redeeming at $100.00 per share, Nabisco sought to retire all of the $3.50 Cumulative Preferred Stock by a self tender offer of $50.00 per share. (TR. 126). The tender offer was extended by Nabisco until August 18, 1983. This action saved Nabisco $50.00 per share, and accomplished the same accounting treatment for the stock purchaser, but cost the preferred shareholder $50.00 per share. In order to force acceptance of the tender, Nabisco advised its preferred shareholders in the tender offer material that it would apply for delisting of the $3.50 Cumulative Preferred from the New York Stock Exchange upon completion of the tender offer; and, that it had no present intention to ever pay the $100.00 per share redemption price. (TR. 123-126).

At the time of the tender offer the $3.50 Cumulative Preferred stock was trading at approximately $42.00 per share. Under the threat of losing their market and the value of the $3.50 Cumulative Preferred stock, the Petitioners and most of the other preferred shareholders tendered their $3.50 Cumulative Preferred to Nabisco. The Petitioners however, advised Nabisco that said tender was under protest, and as a result of the duress that Nabisco exerted on the Petitioners. (TR. 121). After completion of the tender offer by Nabisco, the stock was in fact delisted by the New York Stock Exchange and the only market available to the shareholders of the $3.50 Cumulative Preferred was and is today the price Nabisco elects to pay the few remaining shareholders. (TR. 132).

In order to recover the additional $50.00 per share, Petitioners filed suit against Nabisco in the United States District Court for the Eastern District of Texas, Tyler Division. The jury, after being instructed by the District Court on the applicable Texas statute of limitations, found that Petitioners' causes of action for

fraud, breach of fiduciary duty and various securities law violations were not brought within two years from the date Petitioners first knew or should have known of the violation of their rights and, thus were barred by the alleged applicable statute of limitations. On June 5, 1986, the District Court entered judgment for Nabisco.

The case was appealed to the United States Court of Appeals for the Fifth Circuit. After oral arguments before the Fifth Circuit Court of Appeals, the Fifth Circuit Court of Appeals affirmed the District Court's judgment without opinion.

REASONS FOR GRANTING WRIT

I.

NABISCO'S TENDER OFFER FOR THE PETITIONERS' $3.50 CUMULATIVE PREFERRED STOCK VIOLATED THE RIGHTS OF THE $3.50 CUMULATIVE PREFERRED SHAREHOLDERS UNDER NABISCO'S CERTIFICATE OF INCORPORATION AND THE SECURITIES EXCHANGE ACT OF 1934 AND THE SECURITIES ACT OF 1933

The issue regarding Nabisco's self tender/defacto redemption presents this Court with a case that Petitioners believe is one of first impression and importance for this Court, as well as, for all jurisdictions. *Lehman* v. *Lycoming County Children's Services*, 458 U.S. 502, 507 (1982). *Williams* v. *Lee*, 358 U.S. 217 (1959); *Rice* v. *Sioux City Memorial Park Cemetary*, 349 U.S. 70 (1955).

The issue is whether Nabisco's self tender offer of $50.00 for Petitioners' $3.50 Cumulative Preferred stock, redeemable at $100.00 per share, violated as a matter of law, the rights of the $3.50 Cumulative Preferred shareholders pursuant to Nabisco's Certificate of Incorporation; and as a result, violated the Securities Exchange Act of 1934 and the Securities Act of 1933. Petitioners assert that Nabisco did not have the legal right to use

a self tender offer as a defacto redemption in order to evade the redemption price of $100.00 per share for the $3.50 Cumulative Preferred. (TR. 121).

As the Court is aware, historically, companies such as Nabisco, have used preferred stock to "borrow" capital from the public in order to finance the company's business. In order to understand the enormity of the use of preferred stock by corporations, one only has to look at the New York Stock Exchange to see companies like General Motors, Aluminum Corporation of America, Colgate-Palmolive, Control Data, and DuPont as a few examples of the wide spread use of identical preferred stock as a financing mechanism. In the United States, corporations have raised billions of dollars through the issuance of millions of shares of preferred stock to the general public.

In 1929 Standard Brands was incorporated under the laws of the State of Delaware, and had outstanding, in addition to its common shares, a small issue of $7.00 Cumulative Preferred stock listed on the New York Stock Exchange. The preferred stock had a preference as to assets and dividends and was redeemable at $120.00 a share. (TR. 6). In an environment of declining interest rates, Standard Brands management redeemed all outstanding preferred shares in June 1937, for $120.00 a share. (TR. 6). Immediately thereafter, Standard Brands issued a new $4.50 Cumulative Preferred stock which was redeemable at $110.00 a share and listed such stock on the New York Exchange. In 1946, with interest rates declining, Standard Brands again redeemed the $4.50 Cumulative Preferred stock at $110.00 per share. (TR. 7). After redeeming the $4.50 Cumulative Preferred, Standard Brands issued a $3.50 Cumulative Preferred which is the basis for this litigation. The redemption price of the $3.50 Cumulative Preferred stock was $100.00 per share. However, in 1946 when the $3.50 Cumulative Preferred was issued, the issue was difficult to sell and therefore, Standard Brands in order to reassure its investors "sweetened the offering" by amending its Certificate of Incorporation to include several

new provisions. (TR. 8). The following pertinent provisions were added to the Standard Brands Certificate of Incorporation:

> Without obtaining, *after written notice to all holders of [$3.50 Cumulative]* Preferred Stock, the affirmative approval by vote or written consent of the holders of a majority of the shares of Preferred Stock outstanding as of a record date not more than six months prior thereto, the Corporation shall not (a) alter or amend any of the preferences, special rights or powers of the Preferred Stock so as to affect the Preferred Stock adversely . . . (Emphasis added). (R. 83-84).
>
> The Corporation shall not be entitled to decrease the amount which any class or series of Preferred Stock shall be entitled to receive as dividends or upon distribution of assets in preference to any other class *or decrease the redemption price of such class or series unless the holders of all Preferred Stock of such class or series so affected adversely shall consent thereto.* (Emphasis added). (R. 83-84).
>
> The Corporation reserves the right to increase or decrease its authorized capital stock, or any class or series thereof, or to reclassify the same, and to amend, alter, change or repeal any provision contained in the Certificate of Incorporation under which the Corporation is organized or in any amendment thereto, in the manner now or hereafter prescribed by law, and all rights conferred upon stockholders in said Certificate of Incorporation or any amendment thereto are granted subject to this reservation; *provided, however, that the Corporation shall not decrease the amounts which any class or series of Preferred Stock shall be entitled to receive as dividends or upon a distribution of assets in preference to any other class, or decrease the redemption price of such class or series, unless the holders of all the Preferred Stock of such class or series so affected adversely shall consent thereto.* (Emphasis added). (R. 83-84).

In March 1981 Standard Brands purchased an additional 5,310 shares at $35.00 a share. Shortly, thereafter, it was announced that Standard Brands and Nabisco would merge. On July 1, 1981, a special meeting of the shareholders of Standard

Brands was held in New York City in order to vote on the proposed merger with Nabisco. (TR. 10). A condition for the approval of the combination with Nabisco was that the new Nabisco $3.50 Cumulative Preferred Stock would have the same preferences, special rights and powers as the Standard Brands $3.50 Cumulative Preferred Stock. Based on the representations that these conditions would be met prior to the combination of Standard Brands and Nabisco, the combination was approved by the preferred shareholders and became effective in July 6, 1981, with both the common and the preferred stock of Nabisco being listed on the New York Stock Exchange. As a result, up to this point in time, the Petitioners and purchasers of new Nabisco $3.50 Cumulative Preferred Stock knew the history of the redemption of the prior preferred stock and the logical corollary followed that Nabisco would probably redeem the $3.50 Cumulative Preferred Stock in the future. (TR. 16).

Nabisco's annual meeting of shareholders was held in Boston, Massachusetts on Thursday, May 5, 1981 with 99.85% of all preferred shares represented at the meeting. The $50.00 tender offer had been approved in April, 1981 by the board of directors just prior to the meeting but was not discussed at this meeting with the preferred shareholders. (TR. 112-118). Thereafter, on or about May 20, 1983, after very little research, the Nabisco Board of Directors approved and announced that Nabisco would self-tender for all of its $3.50 Cumulative Preferred Stock at $50.00 per share. (TR. 104, 106-108). Nabisco stated that it wanted to receive all of the outstanding $3.50 Cumulative Preferred Stock pursuant to the tender offer. (TR. 126). In its tender offer material Nabisco also advised its preferred shareholders that Nabisco would apply for delisting of the $3.50 Cumulative Preferred Stock from the New York Stock Exchange upon completion of the tender offer and that it had no present intention to ever pay the $100.00 per share redemption price. In order to induce the preferred shareholders into tendering their stock, Nabisco placed in its tender offer the following coercive warning:

> Upon completion of the Offer, however, the Company intends to apply for delisting of such stock from trading on the New York Stock Exchange and the termination of registration of such stock under the Securities Exchange Act of 1934. *The delisting could adversely affect the liquidity or future market value of the shares of the $3.50 Preferred Stock not tendered.* (Emphasis added). (R. 73).

Petitioners, as a result, were forced to choose between selling the preferred stock at $50.00 based on the information provided by Nabisco or, retaining the stock, which would be materially and adversely affected by the delisting of the $3.50 Cumulative Preferred Stock from the New York Stock Exchange. (TR. 121). Therefore, most of the Petitioners based on the information set forth in Nabisco's tender offer material, tendered all or a portion of their shares of $3.50 Cumulative Preferred to Nabisco and advised Nabisco that the said tender was under protest because of duress exerted by Nabisco on Petitioners. Thereafter, on or about August 15, 1983 Nabisco completed the tender offer and the $3.50 Cumulative Preferred stock was delisted from the New York Stock Exchange.

It is clear that Nabisco was attempting to receive or retire all the $3.50 Cumulative Preferred stock and to coerce the shareholders into tendering the stock in violation of Nabisco's Certificate of Incorporation. (TR. 124-126). Nabisco's officers and directors admitted at trial that Nabisco wanted to retire all of its $3.50 Cumulative Preferred Stock. They further admitted that Nabisco's proxy materials were misleading since Nabisco did not have to apply for delisting from the New York Stock Exchange. (TR. 136, 159). In addition, Nabisco failed to state in the proxy materials that Nabisco would continue to pay dividends to the $3.50 Cumulative Preferred shareholders who did not tender their shares. (R-73).

In addition, Nabisco's self tender offer was a coercive two-tiered tender offer since after the completion of the tender offer, the preferred stock had no market and Nabisco was the only purchaser of the stock at a price substantially lower than $50.00 per share. (TR. 122). Further, the threat of delisting and actual

delisting was a violation of the shareholders contract with Nabisco. The delisting of the preferred stock adversely affected the holders of the same by destroying its liquidity through the removal of the stock from the public market on which it traded. (TR. 121). Moreover, Nabisco made a large profit on the transaction to the exclusion and detriment of the preferred shareholders. Nabisco's general counsel however stated that the only benefit that Nabisco received from the self tender was that it did away with the administration of the preferred stock. (TR. 109). Nabisco's Secretary later admitted that Nabisco carried the $3.50 Cumulative Preferred stock on its balance sheet at $100.00 per share and only paid the preferred shareholders $50.00 per share. Therefore, Nabisco realized a profit of over six million dollars on the self tender/defacto redemption of the $3.50 Cumulative Preferred Stock. (TR. 169).

As a result, Nabisco's use of a self tender was a defacto redemption and violated its contract with Petitioners by adversely affecting the $3.50 Cumulative Preferred Stock without obtaining a written vote of the majority of the $3.50 Cumulative Preferred shareholders, as set forth in Nabisco's Certificate of Incorporation which states:

> The Corporation shall not . . . *decrease the redemption price of such class or series unless the holders of all Preferred Stock of such class or series so affected adversely shall consent thereto.* (Emphasis added). (R. 83-84).

Further, although "redemption" is not defined in the Certificate of Incorporation of Nabisco, the ordinary meaning of the term "redemption" is to repurchase. See *Webster's New College Dictionary,* 1979, page 960. Petitioners do agree that Nabisco had the legal right to purchase its own shares; however, the right of a corporation to purchase its own stock is subject to the condition that the purchase be made in good faith and without prejudice to the rights of the other shareholders. *Fletcher Cyc. Corp.* Section 2854 (Perm. Ed.) Furthermore, the preferred shareholder is entitled to insist upon performance according to

the terms of his contract with the corporation and the company cannot compel a surrender except in strict compliance with the terms of the contract. *Sterling* v. *H. F. Watson, Co.*, 297 A 290 (Pa. 1913). Therefore, the use of the self tender offer by Nabisco to keep from paying the full $100.00 redemption price violated the Petitioners' rights pursuant to Nabisco's Certificate of Incorporation.

Consequently, to allow the decisions of the District Court and Fifth Circuit to stand will allow corporations to issue preferred stock and raise capital from the general public without having to comply at a later date with the corporation's Certificate of Incorporation, on which such shareholders materially relied upon as the statement of their rights, preferences and power with respect to such security. These decisions also condone a corporation's wanton breach of its contracts with its shareholders and disguise said breach as a "benefit" to the shareholders without being accountable to the shareholders. Moreover, such decisions allow a corporation to profit at the expense of its own shareholders. Finally these decisions strike a forceful blow against the strong public policy of protecting the investing public from fraud and deception committed in securities transactions.

II.

THE DISTRICT COURT AND THE FIFTH CIRCUIT COURT OF APPEALS MISAPPLIED THE TWO YEAR STATUTE OF LIMITATIONS TO PETITIONERS' CAUSES OF ACTION FOR BREACH OF FIDUCIARY DUTY AND VIOLATIONS OF SECTIONS 10, 13(e) AND 14(e) OF SECURITIES EXCHANGE ACT OF 1934 AND THE RULES PROMULGATED THEREUNDER.

A corporation through its officers and directors owes its shareholders the utmost trust and fiduciary duty. *Hughes* v. *Houston Northwest Medical Center*, 680 S.W.2d 838 (Tex. App. Houston [1st Dist.] 1984, writ ref'd n.r.e.), cert. denied, 106 S. Ct. 571 (1984); *Gearhart Industries, Inc.* v. *Smith Intern., Inc.*, 741 F.2d 707 (5th Cir. 1984). Because Petitioners were shareholders of $3.50 Cumulative Preferred stock in Nabisco they were owed a fiduciary duty of trust by the officers and directors of Nabisco.

Since there are no specific federal limitations for actions based on breaches of fiduciary duty, the federal courts have looked to the applicable state statutes of limitations relating to the cause of action. *See Erie Railroad Company* v. *Tompkins*, 304 U.S. 64 (1938); *McNeal* v. *Paine Webber, Jackson & Curtis, Inc.*, 598 F.2d 888 (5th Cir. 1979). The Texas Civil Practice and Remedies Code, Section 16.051, which is a recent codification of TEX. REV. CIV. STAT. Art. 5529, states:

> Every action for which there is no express limitations period, except an action for the recovery of real property, must be brought not later than four years after the day the cause of action accrues.

Accordingly, since there is no specific Texas limitations period for actions based on breach of fiduciary duty, the applicable limitations period is four (4) years pursuant to Section 16.051 of the Texas Civil Practice and Remedies Code. In *Peek* v. *Berry*, 143 Tex. 294, 184 S.W.2d 272, 275 (1944), citing TEX. REV. CIV. STAT. Art. 5529 (now codefied as TEX. CIV. PRAC & REM. CODE Section 16.051), the Texas Supreme Court stated:

> [t]he period of limitations applicable to suits to enforce a trust, or arising out of a breach of trust, is ordinarily governed by the four years statute of limitation prescribed for actions other than for the recovery of real estate, for which no limitation is otherwise prescribed.

Further, in *Graham* v. *Turner*, 472 S.W.2d 831, 836 (Tex. Civ. App. — Waco 1971, no writ), a case where a 50% shareholder sued to enforce his interest in the corporation and for breach of fiduciary duties by the owner, the court in following *Yeaman* held:

> [In *Yeaman*,] a suit by minority shareholders against the corporation and officers to enforce their rights and for an accounting, . . . the Supreme Court held that the four year statute applies, because the relation of a corporation to its stockholders is that of a contractual relation, whereby the corporation acquires and holds the stockholder's investment under the express recognition of his right and for a specific purpose. *citing*, *Yeaman* v. *Galveston City Co.*, 167 S.W. 710 (Tex. 1914).

Therefore, Petitioners' suit against Nabisco for breach of its fiduciary duty to their $3.50 Cumulative Preferred stock is governed by the four (4) year limitations period in Section 16.051, not the two (2) year statute of limitations set forth in Article 5526.

In addition, the four (4) year statute of limitations, under Section 16.001 *et seq.* of the Texas Civil Practice and Remedies Code, applies to Petitioners' action alleging securities fraud and Rule 10b-5, 13(e) and 14(e) violations. The Fifth Circuit has held in *Bauman* v. *Centex Corp.*, 611 F. 2d 1115, 1116 (5th Cir. 1980), that the limitations period for a federal securities fraud cases filed in Texas is governed by Article 27.01 of the Texas Business and Commerce Code. *See also Coastal Distributing* v. *NGK Spark Plug Co.*, 779 F.2d 1033, 1038 (5th Cir. 1986). However, since TEX. BUS. & COMM. CODE Art. 27.01 has no limitations period, Texas courts have followed TEX. REV. CIV. STAT. Art. 5526.

Until 1979, TEX. REV. CIV. STAT. Art. 5526 was the controlling limitations provision in Texas for actions involving fraud. Article 5526 stated that the two (2) year statute of limitations was applicable for "actions for debt where the indebtedness is not evidenced by a writing." Article 5526, however, was amended on or about August, 1979, and the above-cited provision was deleted. Following the amendment of Article 5526, the applicable fraud provision was incorporated into the four (4) year statute of limitations, TEX. REV. CIV. STAT. Art. 5527(1) which stated: "All actions for debt must be prosecuted four years after the cause of action has accrued."

In September, 1985, all of the above-cited statutes were codified into the Texas Civil Practice and Remedies Code, Section 16.001 *et seq.* Specifically, Article 5527 was codified into Section 16.004 which now states:

> (a) A person must bring suit on the following actions not later than four years after the date the cause of action accrues . . .
>
> (3) debt

The District Court disagreed with Petitioners' position that the Texas statute of limitations for securities fraud was four (4) years and cited the Fifth Circuit case of *Coastal Distributing* v. *NGK Spark Plug Co.*, 779 F.2d 1033, 1038 (5th Cir. 1986), in support of its judgment.

Coastal Distributing, however, should not control in this case. In *Coastal Distributing*, the Fifth Circuit stated:

> Texas Courts have long applied the two year limitations period of Article 5526 to actions based on fraud. *Eg. Quinn* v. *Press*, 135 Tex. 60, 140 S.W. 2d 438 (1940); *Atomic Fuel Extraction Corp.* v. *Slick's Estate*, 386 S.W.2d 180 (Tex. Civ. App. — San Antonio 1964, writ ref'd n.r.e.).

Coastal Distributing, 770 F.2d at 1038.

The above statement by the Fifth Circuit Court is accurate only because the cases cited in the above quotation were decided prior to the amendment of Article 5526 in 1979, which at that time

provided for a two (2) year limitations period for an "action for debt."

However, the Fifth Circuit went on to further state in *Coastal Distributing:*

> Texas Courts after the 1979 have continued to apply the two year period of Article 5527 for actions based on fraud. *See Mooney* v. *Harlin,* 622 S.W.2d 83, 84 (Tex. 1981) (citing *Quinn and Ryan* v. *Collins,* 496 S.W.2d 205, 210 (Tex. Civ. App. — Tyler 1973, writ ref'd n.r.e.)); *See also Hays* v. *McNeice,* 641 S.W.2d 695 (Tex. App. Amarillo 1982, no writ); *Spellings* v. *Lawyers Title Ins. Corp.,* 644 S.W.2d 804 (Tex. App. — Corpus Christi 1982, writ ref'd n.r.e.).

Coastal Distributing, 779 F.2d at 1038.

Petitioners respectfully submit that the authorities cited in support of the above quotation do not support such holding. Several of the Texas cases cited by the Fifth Circuit were decided prior to the 1979 amendment of Article 5526. Further, the post-1979 Texas cases cited by *Coastal Distributing* tautologically relied, with respect to the two (2) year limitations question, upon case authority decided prior to the 1979 amendment of Article 5526. Moreover, the *Hays* case cited by the Fifth Circuit was a summary judgment case dealing with the sufficiency of Defendant's pleadings in order to withstand the Plaintiff's action for summary judgment. *See Hays* v. *McNeice,* 641 S.W.2d 695 (Tex. Civ. App. — Amarillo 1982, no writ). The *Spellings* case was a Texas Deceptive Trade Practices Act case and such Act provides for a two (2) year statute of limitations. *See Spellings* v. *Lawyers Title Ins. Corp.,* 644 S.W.2d 804, 807 (Tex. App. — Corpus Christi 1982, writ ref'd n.r.e.).

In addition, in the case of *Neely* v. *Bankers Trust Co.,* 757 F.2d 621, 632 (5th Cir. 1985), cited by the Fifth Circuit in *Coastal Distributing,* the cited authority addresses only the equitable estoppel issue in connection with the fraud cause of action. The *Bauman* v. *Centex Corp.,* 611 F.2d 1115 (5th Cir. 1980), also cited in *Coastal Distributing,* addressed the two year

limitations period under Article 5526; however, the authorities cited in *Bauman* are all pre-Article 5526 amendment cases and therefore, the authorities do not control the issues in this case. *See Bauman,* 611 F.2d at 1118.

In addition, the *Coastal Distributing* Court stated "that action for fraud may not be an action for debt." *citing, Quinn* and *Atomic Fuel, supra.*

However, Texas case law clearly states that fraud is an "action for debt." *Miller* v. *Kountze Corporate School Dist.,* 54 S.W.2d 344 (Tex. Comm'n App. 1932, opinion adopted); *Certain Feed Produce Corp.* v. *Bell,* 411 S.W.2d 695 (Tex. Civ. App. — Amarillo 1967) *aff'd* 422 S.W.2d 719 (Tex. 1968).

Therefore, the applicable statute of limitations for Petitioners' securities fraud cause of action under Section 10, 13(e) and 14(e) and the Rules promulgated thereunder is four years pursuant to TEX. CIV. PRAC. & REM. CODE, Section 16.004. As a result, the Fifth Circuit erred in affirming the District Court's ruling that the two year statute of limitations applied to Petitioners' securities fraud causes of action. Accordingly, to allow the District Court's and Fifth Circuit's decisions to stand totally disregards well settled Texas law.

A. The Applicable Statute of Limitations Begins To Accrue When a Legal Injury Results

Assuming arguendo that Texas Courts would apply the two year statute of limitations to actions for fraud, the applicable limitations period only begins to run when a legal injury results. *Bauman* v. *Centex Corp.,* 611 F.2d at 1118. *Atkins* v. *Crossland,* 417 S.W.2d 150 (Tex. 1967).

In *Bauman,* minority shareholders sued a corporation for breach of contract, state law fraud and securities violations. The *Bauman* case is analogous to this case, in that the defendant in *Bauman,* alleged that plaintiffs knew or should have known of the misrepresentation more than two years before the suit was filed. The court stated:

> [T]he general rule is that there can be no legal or actionable fraud unless the act *resulted in injury* to the person defrauded. *Travelers Ins. Co.* v. *Delta Airlines, Inc.*, 498 S.W.2d 443, 447 (Tex. Civ. App. 1973) (emphasis original) . . . Thus until the escrow agreement expired and the stock was lost, plaintiffs sustained no injury, and the misrepresentations had not become a legal injury. *Bauman*, 611 F.2d at 1119.

Prior to August 18, 1983, which was the date Nabisco's self tender offer expired, Nabisco had the right to decline to purchase any shares and could withdraw the tender offer pursuant to section (g) of the tender offer materials which states in pertinent part:

> (g) *Conditions to and Amendment of the Offer.* The Company may decline to purchase any shares of $3.50 Preferred Stock and may withdraw the Offer as to shares not then purchased or paid for, if before the time of purchase or payment there shall have occurred any of the following events which, in the Company's sole judgment, makes it inadvisable to proceed with such purchase or payment:
>
> (i) any government agency or other person shall have instituted or threatened any action or proceeding before any court or administrative agency: (a) which challenges the acquisition of shares pursuant to the offer or which otherwise relates in any manner to the offer; or (b) which materially adversely affects the Company;
>
> (ii) there shall have occurred any material adverse development in any existing action or proceeding with respect to the Company; or
>
> (iii) any state of war, national emergency, banking moratorium or suspension of payments by banks in the State of New York or the State of New Jersey shall have occurred, or any currency or exchange control laws or regulations or general suspension of trading or limitation of prices on the New York Stock Exchange shall have been imposed.
>
> The Company also reserves the right to amend the Offer by public announcement of any amendment.

(R. 73).

Furthermore, as is shown by the above last sentence, Nabisco could have increased the offer to the full redemption price of $100.00 or decreased the offer. Cerf Hirsch had protested the price to Nabisco prior to the expiration date. (TR. 20). Consequently, until the tender offer was actually completed, there was no damage incurred and no injury sustained, so limitations did not commence to run. See *Atkins* v. *Crossland*, 417 S.W.2d 150 (Tex. 1967). Therefore, in this case statute of limitations did not begin to run until the tender offer expired on August 18, 1983.

Accordingly, Petitioners respectfully submit that the District Court and the Fifth Circuit erred in ruling that Petitioners' securities fraud and breach of fiduciary duty causes of action are barred by the two year statute of limitations.

III.

THE DISTRICT COURT ERRED WHEN IT GRANTED, AND THE FIFTH CIRCUIT ERRED IN AFFIRMING, THE DISTRICT COURT'S, DIRECTED VERDICT ON PETITIONERS' "RICO" CAUSE OF ACTION

At the close of Petitioners' case in chief, Nabisco moved for a directed verdict on Petitioners' Racketeer Influence and Corrupt Organizations Act, 18 U.S.C. § 1961-1964 ("RICO") cause of action. (TR. 144). The District Court after considering arguments from both parties' counsel, granted Nabisco's Motion For Directed Verdict on Petitioners' RICO cause of action. (TR. 147). On appeal, the Fifth Circuit affirmed the District Court's ruling.

On a motion for directed verdict, the court should consider all of the evidence in the light most favorable and with all reasonable inferences to the party opposing the motion. *Boeing Company* v. *Shipman*, 411 F.2d 365, 374 (5th Cir. 1969). Motions for directed verdict should not be decided by which side has the better case. *Boeing*, 411 F.2d at 375.

Petitioners, however, sufficiently set forth facts to support their allegation that Nabisco's tender offer and scheme to

defraud the $3.50 Cumulative Preferred shareholders was a RICO violation. In support of Petitioners' contention, Petitioners introduced evidence setting forth the essential elements of a RICO violation. (TR. 104-112; 167-170). In particular, Petitioners properly set forth an "enterprise" engaged and/or affecting interstate commerce through the pattern of racketeering activity. (TR. 104-112). In addition, Petitioners properly evidenced a enterprise separate and distinct from the Defendant Nabisco. (TR. 104-105). Further, Petitioners evidenced an existing and on going organization and enterprise, independent from the alleged predicate offenses. (TR. 118). *U.S.* v. *Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980); *cert. denied*, 450 U.S. 912 (1981).

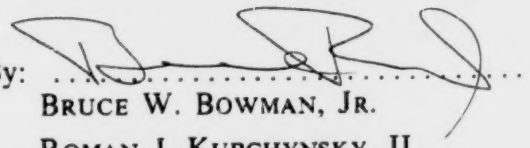
There is no distinction for "enterprise" purposes, between a duly formed corporation that elects officers and holds annual meetings and an amoeba like structure that controls a secret criminal network. *U.S.* v. *Elliott*, 571 F.2d 880, 898 (5th Cir. 1978). Therefore, since Section 1961(4) of the RICO Act defines an "enterprise" as including "any individual partnerships, corporation, association, or other legal entity . . ." and Section 1962(c) prohibits "any person employed by or associated with any enterprise from committing the prescribed conduct." A "person" includes any individual or entity capable of holding a legal or beneficial interest in property." *See* 18 U.S.C. Section 1961(3) (1972). Consequently, considering the broad meaning of the term "enterprise" and the willingness of the federal courts to expand the scope of a RICO application, it is clear, that a corporation may be both a Defendant and an enterprise under RICO. *U.S.* v. *Turkette*, 452 U. S. 516, 587 (1981); *U.S.* v. *Hartley*, 678 F.2d 961, 968 (11th Cir. 1982).

Therefore, Petitioners presented sufficient evidence to the jury regarding Nabisco's violation of the RICO statute and the District Court should have submitted the RICO issue to the jury and the Fifth Circuit erred in affirming the District Court's judgment. (TR. 104-112; 118-120; 167-170).

CONCLUSION

Petitioners respectfully urge, for all reasons set forth above, that the judgments of the District Court for the Eastern District of Texas and Fifth Circuit Court of Appeals require a reversal by this Court. Accordingly, Petitioners request this Court to grant a Writ of Certiorari to review the judgments and opinions of the District Court for the Eastern District of Texas and Fifth Circuit Court of Appeals.

Respectfully submitted,



By: .....

BRUCE W. BOWMAN, JR.

ROMAN J. KUPCHYNSKY, II

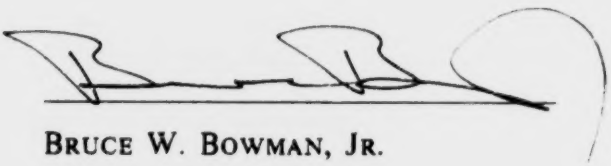
VIAL, HAMILTON, KOCH & KNOX
1500 First RepublicBank
Tower II
Dallas, Texas 5201
(214) 922-9393

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, Bruce W. Bowman, Jr., do hereby certify that on the 10th day of July, 1987, I served, via prepaid first class mail, three (3) copies of the foregoing Petition for Writ of Certiorari on Counsel for Respondent, Burton Brody, Esq., Nabisco Brands, Inc., 625 Madison Avenue, New York, New York 10022. Further, on the 13th day of August, 1987, I served, via prepaid first class mail, three (3) additional copies of the same Petition for Writ of Certiorari on Counsel for Respondent, Burton Brody, Esq., Nabisco Brands, Inc., 625 Madison Avenue, New York, New York 10022.

I further certify that all parties required to be served have been served.



BRUCE W. BOWMAN, JR.
ROMAN J. KUPCHYNSKY

VIAL, HAMILTON, KOCH & KNOX
First RepublicBank Center
1500 Tower II
Dallas, Texas 75201-3890
Attorneys for Petitioners

APPENDIX

IN THE

United States District Court for the Eastern District of Texas Tyler Division

No. TY-85-353-CA

FRANK D. BUNTON, CERF HIRSCH,
JAN HIRSCH VAN HORN, JOE CORDILL,
MRS. JOHN MEREDITH AND MR. EDMUND B. LEWIS, JR.,

Plaintiffs,

VS.

NABISCO BRANDS, INC.,

Defendant.

JUDGMENT

This action came on for trial before the Court and a jury, the Honorable William M. Steger, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict in favor of the Defendant Nabisco Brands, Inc., and against Plaintiffs, Frank D. Bunton, Cerf Hirsch, Jan Hirsh Van Horn, Joe Cordill, Mrs. John Meredith, and Mr. Edmund B. Lewis, Jr..

It is ORDERED and ADJUDGED that Defendant, Nabisco Brands, Inc., have judgment over and against Plaintiffs, Frank D. Bunton, Cerf Hirsch, Jan Hirsch Van Horn, Joe Cordill, Mrs. John Meredith, and Mr. Edmund B. Lewis, Jr., and that said Plaintiffs take nothing by virtue of their claims against Defendant. The Defendant, Nabisco Brands, Inc., shall recover of the Plaintiffs its costs of action.

SIGNED this 5th day of June, 1986.

/s/ WILLIAM M. STEGER
UNITED STATES DISTRICT JUDGE

IN THE

United States District Court for the Eastern District of Texas Tyler Division

No. TY-85-353-CA

FRANK D. BUNTON, CERF HIRSCH,
JAN HIRSCH VAN HORN, JOE CORDILL,
MRS. JOHN MEREDITH AND MR. EDMUND B. LEWIS, JR.,

Plaintiffs,

VS.

NABISCO BRANDS, INC.,

Defendant.

MEMORANDUM IN SUPPORT OF JUDGMENT

On this day a letter from Plaintiff's counsel has been brought to the attention of the Court addressing a possible problem with the statute of limitations issue which the jury found for the Defendant. Plantiff's counsel correctly points out that in 1979 art. 5526 Tex. Rev. Civ. Stat. Ann. was amended and actions for debt where the indebtedness was not evidenced by a contract in writing was deleted from the article. Subsequently all actions for debt were included in the provision in the article providing for a four-year, instead of a two-year, statute of limitations. This change has recently been codified in §16.004 of the Civil Practice and Remedies Code. Plaintiff's counsel, therefore, asserts that the four year statute of limitations should be applied to the fraud issues and breach of fiduciary duty issue that were present in the above case when it was tried to a jury. In light of some recent Fifth Circuit opinions on the subject this Court cannot agree with Plaintiff's interpretation.

In *Coastal Distributing v. NGK Spark Plug Co.*, 779 F. 2d 1033 (5th Cir. 1986), the Fifth Circuit considered and recognized the amendments to the articles governing the statutes of

limitations in Texas and concluded that the two year statute still applied to action based on fraud. Specifically the Fifth Circuit said,

> Texas courts have long applied the two-year limitations period of Article 5526 to actions based on fraud. [citations omitted] . . . Texas Courts after the 1979 amendments have continued to apply the two-year period of Article 5526 to actions based on fraud. [citations omitted] . . . This Court, when applying Texas law, has acted similarly. [citations omitted] . . . 779 F. 2d at 1038.

Further in a more recent case, the Fifth Circuit has unequivocally held that the two-year statute of limitations applies to actions under 10b-5. *See* 15 U.S.C. 78j(b); *Corwin v. Marney, Orton Investments,* Slip No. 85-2401, April 30, 1986. In this opinion the Fifth Circuit stated that the Texas "fraud statute, Tex. Bus. & Com. Code Ann. §27.01 (Vernon 1968) does not contain a time limit within which suit must be brought, but the two-year period of Tex. Rev. Civ. Stat. Ann. art. 5526 (Vernon 1958) now codified in revised form at Tex. Civ. Prac. & Remedies Code Ann. §16.003 (Vernon Supp. 1986) is applied to actions based on fraud."

In light of the Fifth Circuit's recognition of the amendment to article 5526 and their continued application of the two-year statute of limitations for actions based on fraud, this Court believes the issue was correctly presented and answered by the jury.

Judgment shall be entered accordingly.

SIGNED this 5th day of June, 1986.

/s/ WILLIAM M. STEGER
UNITED STATES DISTRICT JUDGE

IN THE

United States Court of Appeals for the Fifth Circuit

No. 86-2515

FRANK D. BUNTON, CERF HIRSCH,
JAN HIRSCH VAN HORN, JOE CORDILL,
JOHN MEREDITH AND MRS. EDMUND B. LEWIS, JR.,

Plaintiffs-Appellants,

VERSUS

NABISCO BRANDS, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Texas (TY-85-353-CA)

(April 13, 1987)

Before BROWN, REAVLEY and JOLLY, Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 47.6.

(2)

Supreme Court, U.S.
FILED
SEP 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-274

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FRANK D. BUNTON, CERF HIRSCH, JAN HIRSCH VAN HORN, JOE CORDILL, MRS. JOHN MEREDITH AND EDMUND B. LEWIS, JR.,

Petitioners,

—v.—

NABISCO BRANDS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

BURTON H. BRODY
625 Madison Avenue
New York, New York 10022
(212) 418-4780

Attorney for Respondent

31 pp

QUESTION PRESENTED

Whether Nabisco Brands, Inc.'s tender offer to purchase petitioners' $3.50 Preferred Stock at $50 per share was lawful under its Certificate of Incorporation.

TABLE OF ABBREVIATIONS

The following abbreviations have been used in Respondent's brief:

REC .....Record, page 1

TR 1 .....Transcript of Trial, page 1

REC Vol. III, 2...Volume III of the Record, page 2

P Ex. 1, 4 .....Petitioners' Exhibit 1, page 4

R Ex. 1, 3 .....Respondent's Exhibit 1, page 3

P BR. 23.....Petitioners' Brief, page 23

LISTING OF INTERESTED PARTIES IN ACCORDANCE WITH S. CT. RULE 28.1

RJR Nabisco, Inc., its subsidiaries and affiliates, including the largest thereof, respondent Nabisco Brands, Inc., and its wholly-owned subsidiaries and affiliates. In addition, a subsidiary of RJR Nabisco, Inc., Nabisco Brands, Ltd. (Canada), is owned 80% by RJR Nabisco, Inc. and 20% by the public, and is listed on the Montreal Stock Exchange.

TABLE OF CONTENTS

	PAGE
Question Presented	i
Table of Abbreviations	ii
List of Interested Parties	ii
Table of Authorities	v
Statement	1
Summary of the Argument	2
Argument	4
I. THE TWO-YEAR STATUTE OF LIMITATIONS BARS PETITIONERS' FRAUD AND BREACH OF FIDUCIARY DUTY CLAIMS	4
A. There Are No Special And Important Reasons For This Court To Determine Whether Texas Would Apply A Two Or Four-Year Statute To The Fraud And Breach Of Fiduciary Duty Claims	4
B. That The Fraud And Breach Of Fiduciary Claims Accrued When Petitioners Knew Of The Fraudulent Conduct Is Also Well Settled And Presents No Novel Or Significant Issues of Law	6
C. Petitioners, Having Made No Objection To The Two-Year Statute At Trial, Have Waived It	8

PAGE

II. APART FROM THE BAR OF THE STATUTE OF LIMITATIONS, THE FRAUD CLAIMS WERE NOT PROVED ON THE MERITS 10

III. THE RICO COUNT IS BASELESS 12

IV. RESPONSE TO SOME ADDITIONAL ARGUMENTS OF PETITIONERS 14

A. *De Facto* Redemption 14

B. Coercion 15

Conclusion 16

Appendix 1a

TABLE OF AUTHORITIES

Cases	PAGE
Atkins v. Crosland, 417 S.W.2d 150 (Tex. 1967)	7, 8
Bauman v. Centex Corp., 611 F.2d 1115 (5th Cir. 1980)	7
Breen v. Centex Corp., 695 F.2d 907 (5th Cir. 1983)	6
Buder v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 644 F.2d 690 (8th Cir. 1981)	6fn.
Coastal Distributing Company v. NGK Spark Plug Co., Ltd., 779 F.2d 1033 (5th Cir. 1986)	4, 5
Cook v. Avien, Inc., 573 F.2d 685 (1st Cir. 1978)	6fn.
Corwin v. Marney, Orton Investments, 788 F.2d 1063 (5th Cir. 1986)	4, 5
Delancey v. Motichek Towing Service, Inc., 427 F.2d 897 (5th Cir. 1970)	10
Diamond v. Lamotte, 709 F.2d 1419 (11th Cir.), *reh. den.*, 716 F.2d 914 (1983)	6fn.
Ernst & Ernst v. Hochfelder, 425 U.S. 185, 96 S.Ct. 1375 (1976)	11
Gearhart v. Smith International, Inc., 741 F.2d 707 (5th Cir. 1984)	5
Graham v. Turner, 472 S.W.2d 831 (Tex. Civ. App. 1971)	5fn.
Herm v. Stafford, 663 F.2d 669 (6th Cir. 1981)	6fn.
Huddleston v. Herman & MacLean, 640 F.2d 534 (5th Cir. 1981), *aff'd in part, rev'd in part on other grounds*, 459 U.S. 375, 103 S.Ct. 683 (1983)	10
Huddleston v. Dwyer, 322 U.S. 232, 64 S.Ct. 1015 (1944)	5

PAGE

International Bankers Life Insurance Co. v. Holloway, 368 S.W.2d 567 (Tex. 1963) 5

Klein v. Shields & Co., 470 F.2d 1344 (2nd Cir. 1972) .. 6fn.

Missouri Portland Cement Co. v. H.K. Porter Co., Inc., 535 F.2d 388 (8th Cir. 1976)..... 15

Mosesian v. Peat, Marwick, Mitchell & Co., 727 F.2d 873 (9th Cir.), *cert. denied*, 469 U.S. 932, 105 S.Ct. 329 (1984) ..... 6fn.

Peek v. Berry, 143 Tex. 294, 184 S.W.2d 272 (Tex. 1944) 5fn.

Redman Industries, Inc. v. Couch, 613 S.W.2d 787 (Tex. Civ. App. 1981), *ref'd n.r.e.* 5

Richardson v. MacArthur, 451 F.2d 35 (10th Cir. 1971). 6fn.

Schaefer v. First National Bank of Lincolnwood, 509 F.2d 1287 (7th Cir. 1975), *cert. denied*, 425 U.S. 943, 96 S.Ct. 1682 (1976) ..... 6fn.

Sedima S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 105 S.Ct. 3275 (1985)..... 12

TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 96 S.Ct. 2126 (1976)..... 10

Wakefield v. Bevly, 704 S.W. 2d 339 (Tex. Civ. App. 1985)..... 5

Court Rules

Supreme Court Rules 17.1, 28.....2 and 2fn., 5

Fifth Circuit Rule 47.6 2

Statutes and Regulations

Federal Rules of Civil Procedure, Rule 51 8

PAGE

Racketeer Influenced and Corrupt Organizations Act ("RICO"):
18 U.S.C. §§ 1961 *et seq.* 2, 12, 13

Securities Act of 1933, as amended:
§ 17(a), 15 U.S.C. § 77(a).....1, 2, 4fn.

Securities Exchange Act of 1934:
§ 10(b), 15 U.S.C. § 78j(b).....1, 4fn., 10
S.E.C. Rule 10b-5, 17 C.F.R. § 240.10b-5 1
§ 12(d), 15 U.S.C. § 781(d) 16
§ 13(e), 15 U.S.C. § 78m(e) .....1, 4fn.
S.E.C. Rule 13(e), 17 C.F.R. § 240.13(e)..... 1
§ 14(e), 15 U.S.C. § 78n(e) 1, 4fn., 10, 15
S.E.C. Rule 14(e), 17 C.F.R. § 240.14(e)..... 1

Tex. [Bus. & Com.] Code Ann., § 27.01 .....1, 4fn.

Other

New York Stock Exchange Rules §§ 802.00, 808.00 ....15, 16

Webster's Ninth New Collegiate Dictionary, 1983, p. 956 and p. 986 14

STATEMENT

This action arose as a result of a garden variety tender offer made by Nabisco Brands, Inc. ("NBI") on May 30, 1983 for any or all of 119,992 outstanding shares of its $3.50 Cumulative Preferred Stock at the price of $50.00 per share. P Ex. 3; P Ex. 6, 3; TR 149. All petitioners were holders of the preferred stock, and all except Frank D. Bunton tendered some or all of their shares in accordance with the terms of the offer. TR 44-45, 60-61, 75-77, 86, 96, 98. Petitioner Cerf Hirsch tendered approximately 12,000 shares of the 97,696 purchased by NBI and received approximately $600,000. TR 149.

The gravamen of petitioners' contention is that they should have received the redemption price of $100 per share instead of the tender offer price of $50 per share because "the purchasers of the new [Nabisco preferred shares] knew the history of the prior preferred stock redemptions and the logical corollary that Nabisco would probably redeem the preferred stock in the future." P BR. 3-4, 8. The putative "prior . . . redemptions" (*Id.*) were 1929, 1937 and 1946 redemptions of other issues by Standard Brands, Inc., which had no relationship with Nabisco Brands, Inc. until 1981 when it combined with Nabisco, Inc. to form Nabisco Brands, Inc. And the so-called "logical corollary" is in fact a legal non-sequitur, if petitioners' argument is that their legal rights are enhanced by some irrelevant history of Standard Brands, Inc., with Cerf Hirsch the only historian. There was no other nexus between such "redemptions" and this tender offer.

On August 15, 1985, more than two years after the date of the tender offer, petitioners filed a complaint in the Eastern District of Texas, Tyler Division against NBI, alleging that the tender offer violated §§ 10(b), 13(e) and 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b); 78m(e), and 78n(e), respectively (hereinafter "§§ 10(b), 13(e) and 14(e) of the 1934 Act") and Rules 10b-5, 13e-3 and 14(e) promulgated thereunder, § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77(a), (hereinafter "§ 17(a) of the 1933 Act"), § 27.01 of the

Texas Bus. & Comm. Code, and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961, *et seq*. Petitioners also alleged that the offer represented a breach of contract, a breach of fiduciary duty by NBI directors (who were not even named as defendants), coercion, *de facto* redemption, *ultra vires* and others. Few meritorious claims require such an avalanche of theories to establish them.

The action was tried before a jury on May 8 and 9, 1986. On motion by NBI, the court directed a verdict in NBI's favor on the RICO claim, the claim of fraud under § 17(a) of the 1933 Act, and the claim of *ultra vires*. TR 146-48. After a jury verdict in NBI's favor on the contract, fraud, and all other theories and claims submitted to it, plaintiffs appealed. The appeal was argued in the Court of Appeals for the Fifth Circuit on April 10, 1987. On April 13, 1987, the court affirmed the judgment below without opinion.

SUMMARY OF THE ARGUMENT

There are no "special and important reasons", Sup. Ct. R. 17.1, for granting a writ of certiorari herein. This is a private dispute between a corporation and a few of its former shareholders. The Fifth Circuit's decision upholding the judgment of the District Court and jury does not conflict with any decisions of this Court, any federal court of appeals or any state court of last resort. The decision does not depart from any accepted or usual course of proceedings and does not involve any unsettled questions of law. There is no issue in this case that has significance to anyone other than the parties.[1] Each issue raised by petitioner herein involves the application of admitted facts to well-settled principles of law. From both the procedural and substantive points of view, there are over-

1 The Fifth Circuit did not issue a written opinion, relying on a local rule that permits it to refrain when, in its judgment, a written opinion would have no precedential value. *See* Order of Affirmance, April 13, 1987, citing Fifth Circuit Rule 47.6. It is set forth in full in the Appendix to the Petition.

whelming reasons for denying the writ on what we must call this frivolous application.

A. All of the fraud and the fiduciary duty claims are not only barred by the Texas two-year statute of limitations, but were unproved on the merits as well (so found by the jury or the District Court, and affirmed by the Fifth Circuit).

B. The RICO claim, dismissed by the District Court on the merits, affirmed by the Circuit, was unproved in all respects, and in particular because no facts were presented showing even one predicate violation, and no pattern of racketeering was even mentioned except in the complaint and the briefs of petitioners.

C. The tender offer was not a redemption, *de facto* or otherwise, or a breach of contract, because the Amended Certificate of Incorporation of Nabisco Brands, Inc. in 1961 does not require redemption of a preferred issue unless the company is in liquidation, in dissolution, or winding up its affairs, none of which occurred, and the Certificate, which permitted redemption at the option of the Board, also permitted the Company to purchase its Preferred Stock at any time. No shareholder was required to sell. (P Ex. 2, Appendix p. 1a)

On the breach of contract claim, we refer again to the Certificate. There is no contractual right in the shareholders to have their shares redeemed. NBI had an absolute right, by any legal method, to offer to buy and to sell its shares. Moreover, the jury disposed of the contract claim in any event by its verdict that plaintiff suffered no damages from any breach of contract.

D. With respect to the claim that "Nabisco's unilateral action causing the delisting of the $3.50 stock was an *ultra vires* act" (Count VII of the Complaint) and its handmaiden, "coercion," we refer to the Certificate as supporting the Directors' vote, and point out that such delisting was not NBI's unilateral act; that the law required disclosure of the

potential delisting; and that neither the District Court, nor the jury, nor the Fifth Circuit found it coercive.

ARGUMENT

I

THE TWO-YEAR STATE STATUTE OF LIMITATIONS BARS PETITIONERS' FRAUD AND BREACH OF FIDUCIARY DUTY CLAIMS

Petitioners have argued that the judgment was incorrect because (1) the applicable statute of limitations for fraud and breach of fiduciary duty is four years, not two years, and (2), in any event, the cause of action accrued when the tender offer expired, not on the date petitioners knew or should have known of any wrongful or misleading conduct.[2]

A. There Are No Special And Important Reasons For This Court To Determine Whether Texas Would Apply a Two or Four-Year Statute To The Fraud and Breach of Fiduciary Duty Claims

Respondent respectfully suggests that the time of this Court (as well as that of respondent), has been imposed upon by asking it to review well-settled issues of Texas law. The Fifth Circuit, in *Coastal Distributing v. NGK Spark Plug Co., Ltd.*, 779 F.2d 1033 (5th Cir. 1986), held that Texas would apply a two-year statute of limitations to actions for fraud. Petitioners have quoted the relevant portions of that decision in their papers, and they will not be repeated herein. The Fifth Circuit reconsidered that decision in *Corwin v. Marney, Orton Invest-*

---

2 The fraud counts alleged violations of §§ 10(b), 13(e) and 14(e) of the 1934 Act and the rules promulgated thereunder, § 17(a) of the 1933 Act and § 27.01 of the Texas Business and Commerce Code. Petitioners argument concerns only those alleged violations that rely on the 1934 Act. We refer to these counts collectively as "the fraud counts." Section 17(a) of the 1933 Act was abandoned by petitioners at trial, and dismissed by the court. TR 147.

ments, 788 F.2d 1063 (5th Cir. 1986), and in the instant action, and did not alter its view. Since *Coastal* was decided on January 2, 1986, to respondent's knowledge, neither the courts nor the legislature of Texas have rendered any decision or taken any action inconsistent with the ruling in *Coastal, Corwin*, or the case at bar.

It is well-settled in Texas that the claim of breach of fiduciary duties by the directors is also subject to the two-year statute. *See International Bankers Life Insurance Co. v. Holloway*, 368 S.W.2d 567 (Tex. 1963); *Redman Industries Inc. v. Couch*, 613 S.W.2d 787 (Tex. Civ. App. 1981), *ref'd n.r.e.; Wakefield v. Bevly*, 704 S.W.2d 339 (Tex. Civ. App. 1985).[3]

And *see Gearhart v. Smith International, Inc.*, 741 F.2d 707, 719 (5th Cir. 1984) where the court held that directors owe duties of "obedience, loyalty, and due care" to the corporation, not the shareholders, who were held to lack standing to assert breach of fiduciary claims against the directors except in a derivative action. Petitioners at bar did not sue the directors.

Generally, issues of state law do not fall within the reach of matters that the Court has indicated it will hear. Sup. Ct. R. 17.1. In *Huddleston v. Dwyer*, 322 U.S. 232, 237, 64 S.Ct. 1015, 1018 (1944) the Court, in a *per curiam* decision, noted:

> The decision of the highest court of a state on matters of state law are in general conclusive upon us, and ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts. . . .

The instant action is not such an exceptional case. Petitioners have suggested no reason, and have supported none, to ask

---

3 Petitioners cite *Peek v. Berry*, 143 Tex. 294, 184 S.W.2d 272 (Tex. 1944) and *Graham v. Turner*, 472 S.W.2d 831 (Tex. Civ. App. 1971) in support of their argument that the four year statute applies. Both of these cases involve a suit by one shareholder against another to create a constructive trust. In such cases, Texas courts have applied the four-year statute. In breach of fiduciary duty cases not falling within this narrow category, the two-year statute has been applied, as in *Holloway, Redman* and *Wakefield, supra*.

this Court to treat the state and federal decisions as inconclusive and deviate from its general practice.

B. That The Fraud And Breach Of Fiduciary Claims Accrued When Petitioners Knew Of The Fraudulent Conduct Is Also Well Settled And Presents No Novel Or Significant Issues Of Law

It is a mundane observation under the law of Texas and the Fifth Circuit that an action for securities fraud accrues when the plaintiff knew or should have known of the fraudulent conduct complained of, *e.g.*, *Breen v. Centex Corp.*, 695 F.2d 907 (5th Cir. 1983). The jury found, as a matter of fact, that petitioners knew or should have known of such allegedly fraudulent conduct by NBI more than two years before the action was commenced. REC 7.

Petitioners urge, however, that the action accrued not when they knew or should have known of any fraud, but sometime later, when the tender offer expired. Their theory is that the offer could have been amended at any time before the expiration date, and therefore petitioners suffered no legal injury before that date. Petitioners tendered their shares before the offer expired.

Petitioners have not suggested any conflict among the circuits or any state law or other reason in support of reviewing this issue. Indeed, the other federal circuit courts that have decided the accrual issue are in agreement with the District Court and the Fifth Circuit.[4]

---

4 *See Cook v. Avien, Inc.*, 573 F.2d 685, 695 (1st Cir. 1978); *Klein v. Shields & Co.*, 470 F.2d 1344, 1346 (2d Cir. 1972); *Herm v. Stafford*, 663 F.2d 669, 682 (6th Cir. 1981); *Schaefer v. First National Bank of Lincolnwood*, 509 F.2d 1287 (7th Cir. 1975); *cert. denied*, 425 U.S. 943, 96 S.Ct. 1682 (1976); *Buder v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 644 F.2d 690, 692 (8th Cir. 1981); *Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873, 877 (9th Cir. 1984), *cert. denied*, 469 U.S. 932, 105 S.Ct. 329 (1984); *Richardson v. MacArthur*, 451 F.2d 35, 39 (10th Cir. 1971); *Diamond v. Lamotte*, 709 F.2d 1419, 1420 (11th Cir.), *reh. den.*, 716 F.2d 914 (1983).

The only authorities cited by petitioners in support of their argument are *Bauman v. Centex Corp.*, 611 F.2d 1115 (5th Cir. 1980), and *Atkins v. Crosland*, 417 S.W.2d 150 (Tex. 1967). Neither is apposite.

In *Bauman*, plaintiff had entered into an arrangement by which stock in the defendant was placed in escrow, subject to an "earn-out" based on the defendant company's performance for the next four years. At the end of the four-year period (March 31, 1975), plaintiff was to receive all of the stock, some of it, or none, depending on the company's success during those four years. Although the fraud was committed in 1970, when plaintiff entered into the arrangement, it was not until 1975 that it was or could have been determined that he would not receive any stock. Accordingly, the court held that the cause of action accrued on March 31, 1975, when the results of the "earn-out" became manifest.

In the instant case, the alleged fraud was so manifest to Cerf Hirsch before August 15, 1983 that *during the tender period*, he supplied information to newspaper men suggesting unlawful activity by NBI and complained to the Chairman and CEO of NBI. R Ex. 2-A through 2-F; R Ex. 6; P Ex. 5. His position is not improved by his having purchased shares during the tender offer, perhaps on the somewhat astonishing wish that at the last minute the offer would be converted to a redemption.

In *Atkins*, which involved a claim against an accountant for malpractice, there was no way to determine whether any injury had been suffered until long after the alleged malpractice was committed. The malpractice consisted of a failure by the accountant to obtain IRS approval, as required by the Internal Revenue Code, for use of the accrual method of accounting. It was not until later, when the tax commissioner assessed a tax deficiency against the plaintiff, who had paid taxes based on the accrual method without IRS approval, that it was known there was an injury. As in *Bauman*, it could not earlier be determined whether there was an act of malpractice, or

whether it would result in injury. And, not to put too fine a point on it, Atkins wasn't a fraud case.

In contrast, petitioners were told on the date they received the tender offer in May, 1983 that NBI would pay $50 per share for their stock. Any alleged legal injury occurred and was known by petitioners in that month when the tender offer arrived at their homes.

There is no reason for this Court to overturn the rule established by the courts below in this and other cases that the two-year statute applies and accrues in accordance with the rule charged by the District Court.

C. Petitioners, Having Made No Objection To The Two-Year Statute At Trial, Have Waived It

In any event, whether the four-year or the two-year statute applies is not properly before this Court. Petitioners waived the objection at trial.

Rule 51 of the Federal Rules of Civil Procedure provides, in pertinent part:

> No party may assign as error the giving or failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

The District Court instructed the jury that the statute of limitations for the fraud and breach of fiduciary counts was two years, and that the claims accrued when petitioners knew or should have known of any wrongful or misleading conduct. TR 212-213. The jurors were given an interrogatory asking whether they found that petitioners knew or should have known of any wrongful or misleading conduct prior to August 15, 1983 (two years before the complaint was filed). The jury answered: "We do." REC 7.

Before the jury retired, petitioners' counsel made a number of objections to the judge's charge, but did not object to the application of the two-year statute. His objection on the issue of limitations included three points: (1), the jury should not have been told to pass over the interrogatories dealing with the substantive elements of the fraud claims if they found the claims time-barred, but instead should be made to answer all of the interrogatories unconditionally, so if a reversal on the accrual issue were later obtained, there would be no need for a new trial; (2), the claims did not accrue and the statute did not begin to run until August 18, 1983, at the end of the offer, and (3), the jury was informed that the burden of proof on this issue was on petitioners, not respondent. The verities of these points aside, there is nothing in the objection that could properly be construed as an argument that the limitations period should be anything other than two years. The full text of the objection dealing with the limitations charge is as follows:

> We would object to the conditioning of Special Interrogatory No. 1 for the reason that it conditions the interrogatory as far as 10(b)5 causes of action, 2701, and as far as the breach of fiduciary duties, and if the Plaintiff is right and that as a matter of law the cause of action did not and cannot arise until August 18 of 1983. Then, in the event the Jury were to return a finding to Interrogatory No. 1 adverse at this time against the Plaintiff, and the case were to be appealed, an Appellate Court would have no findings on the remaining causes of action on which to base a judgment, and it would have no alternative other than to remand the case for a new trial, as opposed to rendering the case.
>
> Lastly, we believe that the instruction on the statute of limitations incorrectly places the burden of proof on the Plaintiffs to prove that it did not occur as upon the Defendants to prove that the statute of limitations has, in fact, run, and the cause of action did, in fact, begin where

it asks in the particular interrogatory and also in the instruction. REC Vol. III, 3.

Accordingly, the objection was waived. *See, e.g., Delancey v. Motichek Towing Service, Inc.*, 427 F.2d 897, 900 (5th Cir. 1970) (objection to jury instructions waived when the nature of the alleged error was not stated). Even if it had not been waived, the Fifth Circuit has decided the question of state law in accordance with Texas law. It had occasion to reconsider its decision twice and did not reach a different conclusion. Neither the courts nor the legislature of Texas have taken any action to express disagreement with these decisions.

II

APART FROM THE BAR OF THE STATUTE OF LIMITATIONS, THE FRAUD CLAIMS WERE NOT PROVED ON THE MERITS

In addition to being barred by the statute of limitations, discussed *supra*, all of these claims were disposed of by the District Court or the jury on the merits and the Fifth Circuit affirmed. They lack merit.

The elements of a claim for relief for a violation of section 10(b) [as well as 14(e)] of the 1934 Act are "(1) a misstatement or an omission (2) of material fact (3) made with scienter (4) on which the plaintiff relied (5) that proximately caused his injury." *Huddleston v. Herman & MacLean*, 640 F.2d 534, 543 (5th Cir. 1981), *aff'd in part, rev'd in part on other grounds*, 459 U.S. 375, 103 S.Ct. 683 (1983).

There was no misstatement or omission of a material fact in the tender offer. The only statement that was less than completely accurate related to the question: who initiates the process of delisting? A fact is material only if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote or act. *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S.Ct.

2126, 2128 (1976). There is little possibility, let alone likelihood, that a shareholder would feel compelled to tender because NBI and not the Stock Exchange would initiate the process of delisting. The material fact was the probability of delisting, and in accordance with law, it was fully disclosed in the offer.

Proof of scienter is also lacking. This Court has defined scienter as "a mental state embracing intent to deceive, manipulate or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193, 96 S.Ct. 1375, 1380 n.12 (1976). There was no evidence of such intent or knowledge by NBI of the falsity of any representation. Petitioners do not pretend any in their brief.

Finally, there was no evidence of reliance. Cerf Hirsch understood the offer. He said as much at trial. TR 16. He was in the oil business, the real estate business; the stock market for almost 60 years, acquiring great experience, actively buying and selling; he was an auditor, a bookkeeper. TR 2-4. No one hoodwinked Cerf Hirsch. He told some of his friends when to buy and sell and sue. Inexplicably, he purchased additional stock during the period of the offer, and paid $51 for it! TR 61, 78-79, 90, 98.

June Meredith testified that she relied on what her husband told her, not on the representations of NBI. TR 99. Edmund Lewis and Jan Hirsch Van Horn, who did not testify at trial, proved no reliance. Joe Cordill testified that he also bought shares during the period of the offer "on the premise that Nabisco was obligated to pay $100 per share for that particular brand of Stock—that particular issue." TR 74-76. He thought "there may be a possibility they [NBI] may pay $100 per share," and he was aware that he was "taking a gamble." TR 83. He looked at the Tender Offer's warning of delisting, but did not believe it. TR 76. No reliance here.

Frank Bunton never tendered, bought some of his stock during the period of the offer, didn't read all of the Tender Offer, and "guess[ed]" that it was a fair statement to say that he "didn't rely on any of the language in there," and knew he

was taking a chance. P Ex. 3; TR 85, 86, 93-94. Again, no reliance.

Whatever the theory, there was no fraud under the 1934 Act.

III

THE RICO COUNT IS BASELESS

In Count V of their complaint, petitioners had asserted that NBI's "activities" constituted "willful fraud in connection with the purchase and sale of securities" and formed a "pattern of racketeering activity" in violation of RICO, 18 U.S.C. §§ 1961 *et seq*. That was the last anyone heard of that particular fraud or the pattern of racketeering in the case, except some generalizations in petitioners' brief and, of course, the District Court's dismissal of the count. NBI's motion for a directed verdict, made at the close of petitioners' case, was granted with respect to this claim with apparent agreement of counsel for petitioners. TR 144, 147. That decision was affirmed by the Fifth Circuit.

A decision by this Court on the RICO count would not break any new ground. A pattern of racketeering activity is defined in detail in § 1961(1) of the Act. In *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 105 S.Ct. 3275, 3278 (1985), this Court summarized the definition as follows:

> RICO takes aim at "racketeering activity", which it defines as any act "chargeable" under several generically described state criminal laws, any act "indictable" under numerous specific federal criminal provisions, including mail and wire fraud, and any "offense" involving bankruptcy or securities fraud or drug-related activities that is "punishable" under federal law.

The class of "racketeering activity" that was alleged at bar was securities fraud. But there was no evidence of such fraud at trial, no evidence of even one predicate offense, not to

mention two. 18 U.S.C. § 1961(5). The trial judge said he was unaware of *any* evidence petitioners raised on the RICO issue, after which counsel for petitioners said:

> "We think thee (sic) is a fair amount—we think there's enough evidence to go to the jury, *assuming we get affirmative findings on the securities fraud.*" [Emphasis supplied] TR 147.

It was a rather baseless assumption on which to expect affirmative findings from the jury when the question addressed by counsel was whether there was enough evidence to get to the jury. In any event, the District Court did not think so and petitioners received no such findings from the jury. Nor do petitioners quote or paraphrase any evidence of fraud in the record. Instead, they conclude, without minor premise, that they introduced enough evidence of all essential elements of a RICO violation, citing TR 104-112, TR 167-170. P BR. 19.

This evidence is said to be in the excerpts from a deposition taken of Walter G. Dunnington, Jr., Executive Vice President and General Counsel of NBI. TR 102.

Petitioners' Brief, 19 relied on its *ipse dixit*, pointing to no evidence and no legal support for it. The reference to the testimony of Walter Dunnington, TR 104-112, fails to prove a violation of RICO. It has no relevance to any issue involved in a RICO count. Pages 167-170 of the transcript contain testimony by Ward M. Miller, Jr., NBI's Secretary. This testimony does not aid petitioners. His testimony, TR 167-170, discloses no evidence of racketeering activity. He merely set forth the accounting treatment of the preferred stock. It was properly listed on the balance sheet at $100 per share because that would be the amount due if the company were liquidated.

But assuming, *arguendo*, that the tender offer could, by some extraordinary alchemy, be transmuted into racketeering activity, it would be an isolated event. It does not amount to a pattern. Not a single predicate offense was shown in the evidence. Without two predicate offenses, there is no RICO

cause here, and neither the District Court nor the Fifth Circuit erred in dismissing it.

IV

RESPONSE TO SOME ADDITIONAL ARGUMENTS OF PETITIONERS

A. *De Facto* Redemption

Unable to establish that NBI was required to redeem, petitioners assert that the tender offer was or should be treated as a *de facto* redemption because it violated, as a matter of law, the rights of the holders granted in the Certificate of Incorporation, and coerced them into tendering their stock by pointing out in the offer the possibility (probability, if they prefer) of delisting. Of course, they have offered no evidence or authority in support.

No matter how many times petitioners repeated these charges and others, they did not at the trial persuade anyone of their validity, nor in the Circuit Court, and in their petition they have pointed to no evidence to support any of the charges.

There is no evidence that NBI in any measure violated the requirements of its Amended Certificate of Incorporation or its contract with the shareholders. There was none at the trial and there is none here. NBI faithfully adhered to its Amended Certificate. (See Appendix, p. 2a in particular, P Ex. 2, 4, ¶ 4(B)(4); P Ex. 3, 4).

Petitioners have not shown that what they choose to call a redemption was a redemption and not a tender offer, except by reference to Webster. The indicia of redemption are not satisfied by a tautological definition from Webster that redemption means purchase. While some redemptions are purchases, not every purchase is a redemption; indeed, without more, few purchases are redemptions. *See Webster's Ninth New Collegiate Dictionary, 1983, p. 956 and p. 986.*

B. Coercion

Because the offering documents suggested that NBI intended to apply for delisting at the end of the offering of the $3.50 cumulative preferred stock, petitioners urge coercion. NBI did not in fact apply for delisting. Such delisting was initiated by the New York Stock Exchange in accordance with its § 802.00 (which provides that the Exchange will consider delisting the shares of an issue if their aggregate value falls below $2,000,000 or the number of publicly-held shares falls below 100,000). In such case, application to the SEC for approval to delist is discretionary with the Exchange. R Ex. 13, §§ 801.00, 802.00.

NBI did inform the Exchange (as required by the Rule) of the end and result of the tender offer. Reasonably anticipating that both tests would almost certainly be met (there were only 119,992 shares held by 760 record holders subject to the offer, P Ex. 3, 2), NBI set forth the information about the probability of delisting in the offer to assure that the shareholders were made aware of it. Actual delisting was not in the hands of NBI, but of the Exchange and the SEC.

Moreover, in a tender offer, even the possibility of delisting is a material fact that must be disclosed to shareholders. Disclosure of the probability, not who would make the application, is the requirement. The shareholders must be and were told. It was a "sufficiently appreciable" fact. Failure to have done so would have been a violation of the 1934 Act, § 14(e). *Missouri Portland Cement Co. v. H. K. Porter Co., Inc.*, 535 F.2d 388 (8th Cir. 1976). After the offer, less than 23,000 shares of the NBI $3.50 cumulative preferred stock remained in public hands with a value well under $1,000,000, on any theory of value. TR 149; R Ex. 10.

There was no material misstatement, and no coercion. The anticipated procedure is, in any event, irrelevant to the shareholders. If required disclosure can be judged coercive, the statement that the Exchange might apply for delisting would have been even more so.

Finally, NBI, as issuer, could have initiated the application for the delisting. A security may be withdrawn from listing "upon application by the issuer or the Exchange to the [Securities Exchange] Commission." R Ex. 13, § 808.00 quoting § 12(d) of the Securities Exchange Act of 1934, 15 USC § 781(d).

This case had its genesis in no applicable legal theory and is without factual substratum. Petitioners simply wanted more than they received. They wanted it before the District Court. They wanted it before the jury. They wanted it before the Fifth Circuit. All have agreed they are not entitled to it. There is no basis for this Court to consider this matter anew.

CONCLUSION

WHEREFORE, for the reasons set forth above, respondent respectfully prays this Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

Burton H. Brody
625 Madison Avenue
New York, New York 10022
(212) 418-4780

Attorney for Respondent
Nabisco Brands, Inc.

CERTIFICATE OF SERVICE

I, Burton H. Brody, do hereby certify that on September 17, 1987, I served, via prepaid first class mail, three (3) copies of the foregoing Response to the Petition For a Writ of Certiorari on Counsel of Record for Petitioners, Bruce W. Bowman, Jr., Messrs. Vial, Hamilton, Koch & Knox, 1500 First Republic Bank Center, Tower II, Dallas, Texas 75201-3890.

I further certify that all parties required to be served have been served.

Burton H. Brody

Counsel of Record for Respondent Nabisco Brands, Inc.

APPENDIX

Restated Certificate of Incorporation of
Nabisco Brands, Inc.
(P Ex. 2, 1-6)

Relevant provisions of the Restated Certificate of Incorporation are set forth below.

"PREFERRED STOCK

"(A) Preferred Stock of the Corporation may be issued in various series, as may be determined from time to time by the Board of Directors, each of such series to be distinctly designated. All shares of any one series of Preferred Stock shall be alike in every particular and all series hereafter created shall rank equally and be identical in all respects, except as hereinafter in subdivisions (1) to (6) inclusive of this Clause (A) set forth:

* * *

"(3) the Preferred Stock of any series may, but need not be, made redeemable at the option of the Corporation as a whole or from time to time in part, at such times, and at such price or prices per share (plus in every case an amount equal to all dividends on such share accrued and unpaid up to the date fixed for redemption, whether or not the same shall have been declared or earned), all as may be fixed by the Board of Directors in the resolution or resolutions providing for the issuance of the Preferred Stock of such series. P Ex. 2, 1.

* * *

"(B) The following provisions shall apply to all the Preferred Stock irrespective of any variation between the Preferred Stock of the different series:

* * *

"(3) Upon any dissolution, liquidation or winding up of the Corporation, voluntary or involuntary, the holders of the Preferred Stock of each series shall be entitled to receive out of the assets of the Corporation (whether capital or surplus) the amount or amounts per share fixed

for the respective series, plus in the case of each share, an amount equal to all dividends on such share accrued and unpaid . . . before any distribution of the assets to be distributed shall be made to the holders of the Common Stock of the Corporation . . . P Ex. 2, 3.

* * *

"Nothing herein contained shall limit any legal right of the corporation to purchase any shares of the Preferred Stock." P Ex. 2, 4, ¶ 4(B)(4).

* * *

$3.50 CUMULATIVE PREFERRED STOCK

* * *

"(1) * * *

"(2) The amounts payable on shares of such series on dissolution, liquidation or winding up of the Corporation shall be: $100 per share in case of involuntary dissolution, liquidation or winding up of the Corporation, and the then current redemption price per share in case of voluntary dissolution, liquidation or winding up of the Corporation . . .

"(3) The shares of such series shall be redeemable at the option of the Corporation at any time in whole or from time to time in part, at a price of $100.00 per share; plus in each case (as provided in the Certificate of Incorporation) an amount as to each share equal to all dividends on such share accrued and unpaid up to the date fixed for redemption." P Ex. 2, 6.

The Tender Offer
(P Ex. 3, 4)

Relevant provisions of the tender offer are set forth below.

"2. SPECIAL FACTORS.

(a) . . .

(b) *Effects of the Offer.* . . .

"It is not possible to predict how many shares of the $3.50 Preferred Stock will be properly tendered pursuant to the offer. Upon completion of the Offer, however, the Company intends to apply for the delisting of such stock from trading on the New York Stock Exchange and the termination of registration of such stock under the Securities Exchange Act of 1934. The delisting could adversely affect the liquidity or future market value of shares of $3.50 Preferred Stock which are not tendered.

(c) *Fairness of the Offer.* . . .

"In deciding upon the fairness of the Offer, the Company considered the current and historical market prices of the $3.50 Preferred Stock, as well as prices of preferred stocks issued by other major U.S. corporations. As indicated on page 6, the market price per share of $3.50 Preferred Stock has ranged from a high of $42 to a low of $25.75 from January 1, 1981 to immediately prior to the announcement of this Offer on May 13, 1983. The market price ranges of preferred stocks of other major U.S. corporations since January 1, 1981, have been at comparable levels, when adjusted for individual dividend rates.

"The last sale price of $3.50 Preferred Stock on the New York Stock Exchange immediately prior to the press announcement of this Offer on May 13, 1983, was $42 per share. The Offer price therefore represents a premium of nearly 20% over the market price of the $3.50 Preferred Stock prior to the announcement of this Offer.

"The holders of $3.50 Preferred Stock who elect to tender their shares will thus realize a significant premium over market prices for such shares prior to the announcement of the Offer. Realization of the liquidation preference of $100 per share, payable in the event the Company should be liquidated, is an extremely remote possibility in view of the Company's current financial position.

"WITH RESPECT TO REDEMPTION RIGHTS, THE COMPANY HAS NO PRESENT INTENT TO REDEEM ANY SHARES OF ITS $3.50 PREFERRED STOCK, REGARDLESS OF HOW MANY SHARES REMAIN OUTSTANDING UPON EXPIRATION OF THE OFFER."

Supreme Court, U.S.
FILED
OCT 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-274

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FRANK D. BUNTON, CERF HIRSCH,
JAN HIRSCH VAN HORN, JOE CORDILL,
MRS. JOHN MEREDITH AND EDMUND B. LEWIS, JR.,

Petitioners,

VS.

NABISCO BRANDS, INC.

Respondent.

PETITIONERS' REPLY BRIEF TO BRIEF OF RESPONDENT IN OPPOSITION

VIAL, HAMILTON, KOCH & KNOX
BRUCE W. BOWMAN, JR.
(Counsel of Record)
ROMAN J. KUPCHYNSKY, II
1500 First RepublicBank Center
Tower II
Dallas, Texas 75201
(214) 922-9393

Attorneys For Petitioners

TABLE OF CONTENTS

	PAGE
TABLE OF ABBREVIATIONS	ii
TABLE OF AUTHORITIES	iii
REPLY ARGUMENT	2
I. NABISCO BRANDS, INC.'S SELF TENDER OFFER FOR PETITIONERS' $3.50 CUMULATIVE PREFERRED STOCK WAS FRAUDULENT, COERCIVE AND A VIOLATION OF FEDERAL SECURITIES LAW AND NABISCO'S CERTIFICATE OF INCORPORATION	2
II. PETITIONERS DID NOT WAIVE THEIR OBJECTION TO THE TRIAL COURT'S INSTRUCTION REGARDING THE APPLICATION OF THE TWO YEAR STATUTE OF LIMITATIONS	4
CONCLUSION	6

TABLE OF ABBREVIATIONS

For the convenience of the Court, the following abbreviations will be used in Petitioners' Reply Brief:

Transcript of Proceeding in District Court for the Eastern District of Texas	TR.
Record/Pleadings in District Court for the Eastern District of Texas	R.
Petitioners' Petition for Writ of Certiorari	P BR.
Brief of Respondent	R BR.

TABLE OF AUTHORITIES

Cases

PAGE

City of Newport v. *Fact Concerts, Inc.*, 453 U.S. 245, 256 (1981) 5

McPhee v. *Reichel*, 461 F.2d 947, 950 (3rd Cir. 1972) 5

Sandridge v. *Salem Offshore Drilling Co.*, 764 F.2d 252, 257 (5th Cir. 1985) 5

Sheppard Federal Credit Union v. *Palmer*, 408 F.2d 1369, 1372 (5th Cir. 1959) 5

Smart v. *Texas American Bank/Galleria*, 680 S.W.2d 896, 898 (Tex. App. - Houston [1st Dist.] 1984, no writ) 4

STATUTES AND REGULATIONS

Federal Rules of Civil Procedure, Rule 51 4

No. 87-274

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FRANK D. BUNTON, CERF HIRSCH,
JAN HIRSCH VAN HORN, JOE CORDILL,
MRS. JOHN MEREDITH AND EDMUND B. LEWIS, JR.,

Petitioners[1]

VS.

NABISCO BRANDS, INC.

Respondent[2]

PETITIONERS' REPLY BRIEF TO BRIEF OF RESPONDENT IN OPPOSITION

FRANK D. BUNTON, CERF HIRSCH, JAN HIRSCH VAN HORN, JOE CORDILL, MRS. JOHN MEREDITH and EDMUND B. LEWIS, JR., respectfully submit their Reply Brief to Brief of Respondent in the above entitled case.

---

[1] Petitioners are: Frank D. Bunton, Cerf Hirsch, Jan Hirsch Van Horn, Joe Cordill, Mrs. John Meredith and Edmund B. Lewis, Jr.

[2] Respondent is: Nabisco Brands, Inc., a Delaware corporation that is a wholly owned subsidiary of R. J. Reynolds, Inc.

REPLY ARGUMENT

I.

NABISCO BRANDS, INC.'S SELF TENDER OFFER FOR PETITIONERS' $3.50 CUMULATIVE PREFERRED STOCK WAS FRAUDULENT, COERCIVE AND A VIOLATION OF FEDERAL SECURITIES LAW AND NABISCO'S CERTIFICATE OF INCORPORATION

Nabisco attempts to characterize their self tender offer as a "garden variety" offer. R BR 1. However, a close review of Nabisco's self tender offer/defacto redemption reveals a very calculated and deceptive use of the self tender in order to avoid redeeming the preferred stock and to "freeze out" or coerce the Petitioners into tendering their $3.50 Cumulative Preferred Stock.

Nabisco in its' brief in opposition to Petitioners' Petition for Writ of Certiorari conveniently avoids a response to the most important points set forth by Petitioners regarding Petitioners' securities law violations, breach of contract, fiduciary duty and fraud causes of action.

First, Nabisco fails to address Petitioners' discussion of the six million dollar profit Nabisco realized on the self tender/defacto redemption of the $3.50 Cumulative Preferred Stock. Throughout this lawsuit, Nabisco has attempted to portray the Petitioners as unreasonably attempting to obtain an additional $50.00 per share to which they were allegedly not entitled.

Whereas, upon close review of the transaction, Nabisco realized a six million dollar profit on the transaction without disclosing the profit to their shareholders. (TR. 123-126). Further, knowing that the self tender/defacto redemption would make Nabisco a six million dollar profit, Nabisco advised their $3.50 Cumulative Preferred shareholders to tender their shares. (TR. 109; 169). Nabisco contends that contractually it had the right to use any legal method to buy

its shares. However, Nabisco did not have the right to misinform and deceive its shareholders into tendering their $3.50 Cumulative Preferred Shares. R BR 3. Clearly, this type of behavior by a corporation in connection with a self tender offer, is fraudulent, coercive and a breach of its fiduciary duty to its shareholders.

In addition, Nabisco contends that its intention to delist the stock was not coercive. R BR 15. It is inconceivable how Nabisco can take this position when the tender offer documents stated:

> *Upon completion of the Offer, however, the Company intends to apply for delisting of such stock from trading on the New York Stock Exchange* and termination of registration of such stock under the Securities Exchange Act of 1934. (Emphasis added) (R. 73).

The tender offer documents did not state why Nabisco intended to delist the stock nor, did the documents advise the shareholders why Nabisco would apply for delisting at the end of the offer. The Nabisco self tender offer documents only disclosed to the $3.50 Cumulative Preferred shareholders that at the end of the self tender, Nabisco would no longer trade its $3.50 Cumulative Preferred Stock on the New York Stock Exchange. Therefore, Petitioners had to tender their shares or lose the market for their shares.

As a result, this well disguised coercive self tender offer/defacto redemption of Nabisco, forced Petitioners to make a decision regarding Nabisco's self tender without complete and proper disclosure by Nabisco. Further, the coercive self tender/defacto redemption forced the Petitioners to accept the fifty dollar ($50.00) tender offer. Petitioners had to accept the Nabisco self tender offer in order to protect themselves against having no market on which to trade their shares. Petitioners also had to protect themselves against potentially losing the entire value of their shares.

Nabisco's unilateral actions therefore adversely affected Petitioners. Accordingly, Nabisco breached its Certificate of

Incorporation. P BR 6-10; (R 83-84). To allow Nabisco and large corporations like Nabisco to: conduct business in the public securities markets in the above described manner, breach its contracts with its shareholders and, disguise such a breach as a "benefit" to the shareholders, is contrary to the strong public policy of protecting the average private investor from the overwhelming power of large corporations.

II.

PETITIONERS DID NOT WAIVE THEIR OBJECTION TO THE TRIAL COURT'S INSTRUCTION REGARDING THE APPLICATION OF THE TWO YEAR STATUTE OF LIMITATIONS

Petitioners submit that Nabisco has misconstrued the application Rule 51 of the Federal Rules of Civil Procedure to the facts in this case. The question of what is the applicable period of limitations for breach of fiduciary duty and fraud is a question of law and not a jury question. *Smart v. Texas American Bank/Galleria*, 680 S.W. 2d 896, 898 (Tex. App. — Houston [1st Dist.] 1984, no writ).

It is undisputed that Petitioners brought this suit within four years. (R. 92). Therefore, Petitioners suit was not barred by the four year statute of limitations and the issue that the jury was required to answer was whether the case was brought within two years from the date Petitioners knew or should have known about the fraud. Accordingly, pursuant to Rule 51 of Federal Rules of Civil Procedure, Petitioners were not required to object to the trial court's instruction since, Petitioners filed their suit within four years. (R. 92).

Even if one were to assume arguendo, that an objection was required in the trial court to the Court's instruction regarding the applicable limitations period for breach of fiduciary duty and fraud, Petitioners did not waive their

objection to the instruction; since, the trial court's instruction is reviewable under the "plain error" standard of Rule 51 of Federal Rules of Civil Procedure.

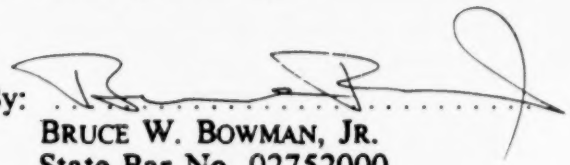
Pursuant to Rule 51, it is the responsibility of the trial judge to provide the jury with a clear and accurate statement of the law that the jury is expected to apply in reaching its verdict. *McPhee v. Reichel*, 461 F.2d 947, 950 (3rd Cir. 1972) *Sheppard Federal Credit Union v. Palmer*, 408 F.2d 1369, 1372 (5th Cir. 1959). Therefore, if the trial judge fails to properly instruct the jury as to the correctness of the law, this Court has the authority to review the instruction under the "plain error" standard of Rule 51 in order to correct obvious instances of injustice and misapplied law. *City of Newport v. Fact Concerts*, Inc., 453 U.S. 245, 256 (1981); *Sandridge v. Salem Offshore Drilling Co.*, 764 F.2d 252, 257 (5th Cir. 1985).

In this case, the trial judge incorrectly instructed the jury that the Texas two year statute of limitations applies to breaches of fiduciary duty and fraud. (TR. 212-213). Therefore, this Court under the "plain error" standard should correct this obvious misstatement of the law by the trial court.

CONCLUSION

Petitioners respectfully urge, for all reasons set forth above, that the judgments of the District Court for the Eastern District of Texas and the Fifth Circuit Court of Appeals require a reversal by this Court. Accordingly, Petitioners request this Court to Grant a Writ of Certiorari to review the judgments of the District Court for the Eastern District of Texas and the Fifth Circuit Court of Appeals.

Respectfully submitted,

By: 

BRUCE W. BOWMAN, JR.
State Bar No. 02752000

ROMAN J. KUPCHYNSKY, II
State Bar No. 11764700

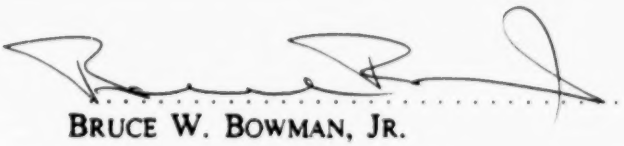
VIAL, HAMILTON, KOCH & KNOX
1500 First RepublicBank Center
Tower II
Dallas, Texas 75201-3890
(214) 922-9393

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, Bruce W. Bowman, Jr., do hereby certify that on the 5th day of October, 1987, I served, via prepaid first class mail, three (3) copies of the foregoing Petitioners' Reply Brief to Brief of Respondent, on counsel for Respondent, Burton Brody, Esq., Nabisco Brands, Inc., 625 Madison Avenue, New York, New York 10022.

I further certify that all parties required to be served have been served.



BRUCE W. BOWMAN, JR.

ROMAN J. KUPCHYNSKY, II

VIAL, HAMILTON, KOCH & KNOX
1500 First RepublicBank Center
Tower II
Dallas, Texas 75201-3890

Attorneys for Petitioners